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January 27, 2003

***EX PARTE* NOTICE - ELECTRONIC FILING**

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Notice; UNE Triennial Review, Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 22, 2003, David Zesiger, Executive Director of the Independent Telephone & Telecommunications Alliance ("ITTA"), and I met with Daniel Gonzalez, Senior Legal Counsel to Commissioner Martin, in connection with the above referenced dockets. The attached outline, which was presented at the meeting, summarizes the issues discussed.

Please contact me at (202) 637-2200 if you have any questions regarding the subject of this submission.

Respectfully submitted,

Karen Brinkmann

cc: Daniel Gonzalez

Attachment

THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE (ITTA)
JANUARY 22, 2003

UNE TRIENNIAL REVIEW

I. The Governing Framework for the FCC's UNE Review Must Be the Market-Specific "Impairment" Analysis Required by the Statute and the Courts

A. Section 251(d)(2) Indisputably Requires Market-Specific Unbundling Rules -- The FCC Must Consider the "Impairment" to the Particular Carrier Requesting a Network Element Before an ILEC Is Ordered to Provide It[1]

1. The Supreme Court ruled that the FCC's unbundling rules must reflect market-specific analysis.[2]

2. The D.C. Circuit affirmed that the FCC must perform a more granular analysis of each market, and criticized the current rules for failure to identify "precisely the impairment facing requesting carriers" and resulted in unbundling obligations "in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress's concern."[3]

B. ITTA Has Consistently Argued For a More Granular Level of Analysis Of All the Commission's Regulatory Burdens

C. The Impairment Analysis Required By the D.C. Circuit Cannot Be Satisfied With Respect to the Switching UNE

1. The record demonstrates an abundance of affordable, competitive switching capability from multiple suppliers.

a) Thousands of CLEC switches have been deployed in markets all over the country, many of them collocated with the ILECs' own switches.[4]

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[1] The statue states: "...the Commission *shall* consider, *at a minimum*, whether...the failure to provide access to such network elements would impair the ability of *the telecommunications carrier seeking access* to provide the services that it seeks to offer." 47 U.S.C. §251(d)(2)(emphasis added).

[2] In *AT&T v. Iowa Utilities Board,* the Court noted the requirement that the Commission take into account, *inter alia*, the availability of the requested network element from sources other than the incumbent's network (*e.g.,* competing facilities in the particular market). *See* 535 U.S. 366, 389 (1999).

[3] *United States Telecom Association v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002).

[4] *See, e.g., ex parte* submission of United States Telecom Association in CC Dockets 01-338, 96-98 and 98-147 at 2 (Dec. 11, 2002) (citing the Association for Local Telecommunications Services Annual Report, *The State of Local Competition in 2002,* at 8 (April 2002), which reports 1,244 CLEC voice switches and 9,524 CLEC data switches as of

b) ILECs also have demonstrated their ability to enter each other's markets from neighboring service areas using their existing switching capabilities – without even requesting access to the incumbent's network in the market they seek to enter.

2. The record contains no evidence of "impairment" in obtaining or deploying switching capability.

a) To de-list an element, the Commission need not find that CLECs have actually deployed a UNE in any particular market, but only that the network element be "*available*" from sources other than the ILEC network.[5]

b) One of the largest CLECs, Time Warner Telecom, submitted a joint proposal with BellSouth to de-list the switching UNE for business customers because CLECs are not impaired in the provision of switching to business customers.[6] Because the same switches serve both business and residential customers, there also is no impairment to CLECs as to the provision of switching to residential customers.

3. The Commission should recognize that a single switch-based competitor can have a significant impact in the smaller markets served by independent ILECs; failure to de-list the switching UNE in such markets would ignore the record evidence that CLECs simply are not "impaired" in such markets.

a) In Anchorage, one switch-based competitor has over 40% of the market, including both residential and business lines, and already has deployed a significant amount of its own distribution plant.

II. Section 251(d)(2) Requires the Commission To Conduct a More Granular Analysis Of "Impairment" To Take Into Account the Differing Characteristics of Independent ILEC Markets, and Thereby Avoid Unduly Burdening Independent ILECs With Requirements Designed for Bell Operating Companies ("BOCs")

A. For the Commission's Analysis To Be Appropriately Granular, It Must Assess Competitive Impairment Differently In Different-Sized Markets

1. Smaller markets typically have fewer customers, smaller business customers, and lower average revenue per customer, than larger markets.

September 30, 2001); *see also ex parte* submissions in these dockets by Verizon (January 10, 2003) and SBC (October 24, 2002).

[5] *See AT&T v. Iowa Utilities Board,* 535 U.S. 366, 389 (1999).

[6] *Ex parte* submission of BellSouth and Time Warner in CC Dockets 01-321 and 01-338 at 4 (August 26, 2002).

2. Because smaller markets typically generate less revenue than larger markers they are unlikely to support the same number of competitors as larger markets.

B. Imposing Uniform Pre-Conditions To UNE Relief For All ILECs Would Contradict the D.C. Circuit's Mandate That the Commission's Rules Must Be Based Upon Market-Specific Analysis

1. The Act requires that UNE obligations, as well as the conditions for relief from them, reflect market-specific analysis.

2. In considering any threshold criteria for unbundling relief, the FCC should avoid requirements that inappropriately, and perhaps inadvertently, disadvantage smaller carriers.

3. The FCC should not impose a multiple-competitor standard as a pre-condition to granting any UNE relief, as some commenters have suggested.

a) Smaller markets typically cannot support the same number of competitive carriers as larger markets, for the reasons stated above.

b) A single competitor can have a far more significant impact in a smaller market, as in Anchorage and Fairbanks.[7]

c) As noted above, a rule requiring a demonstration of multiple competitors collocating their own switches in an ILEC's wire centers as a precondition to relief from the switching UNE would impose an "undue economic burden" on two percent LECs. It would effectively put UNE relief out of the reach of non-BOCs, even though, in smaller, less dense markets, a single competitor often provides powerfully effective competition.

4. The Commission should not require that electronic operations support systems ("OSS") capabilities be mandatory for ILECs across-the-board, to make it easier for competitors to request and obtain UNEs (through so-called "hot cuts"), as a pre-condition to obtaining relief from the switching UNE.

a) Independent ILECs serve markets that typically are not large enough to justify the cost of electronic OSS. Even competitors entering smaller markets served by independent ILECs have not wanted to implement electronic interfaces with the ILECs because the high costs associated with such systems is not justified by the number of customers, and the smaller number of cut-overs, in such markets. For example, even in the largest markets served by the independent ILECs,

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[7] *See, e.g., ex parte* submission of Alaska Communications Systems Group, Inc. in CC Dockets 01-338, 96-98 and 98-147 (January 6, 2003).

CLECs have rejected implementation of electronic OSS due to cost considerations:

(1) In Cincinnati, the ILEC was required to develop electronic OSS to facilitate the transition of customers to competitors' networks. However, no competitor ever made use of the electronic OSS, finding the more economical manual processes to be sufficient to meet their needs.

(2) In Anchorage, although the interconnection agreement provides for electronic OSS, neither the ILEC nor the CLEC has desired to incur the cost of implementing electronic OSS; the CLEC has an over 40% market share notwithstanding.

b) Such a rule would impose an undue economic burden on all independent markets, but the disproportionate nature of that burden grows in smaller markets where carriers that lack economies of scale.

c) Requiring competitive carriers to interface with an ILEC via electronic OSS places an unacceptable economic burden on the competitor as well as the incumbent; this could violate the D.C. Circuit's mandate to analyze at an appropriately granular level the likelihood that a particular unbundling rule would actually stimulate competitive entry.[8]

5. New and burdensome performance measures and reporting requirements tailored to the market conditions that prevail in BOC markets similarly have not been justified in markets served by independent ILECs.[9]

a) For example, minimum volumes and maximum timeframes for UNE loop conversions designed for the BOCs should not be imposed on independent ILECs; rather, the Commission should acknowledge that access to UNE loops has never been established as a barrier to competitive entry in non-BOC markets, and therefore no "impairment" can be said to exist with respect to loop provisioning in these markets.

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[8] For example, the court specifically criticized the Commission's failure to consider that in some markets, such as high-cost markets where rates are held below cost by regulation, any competitive entry that might be induced by unbundling would be "wholly artifical." *United States Telecom Association v. FCC*, *supra*, 290 F.3d at 422-23.

[9] See ITTA's Comments, filed January 22, 2002, and Reply Comments, filed February 12, 2002, in CC Dockets 01-318, *et al.*

III. Section 251(d)(2) Is Informed By the Larger Statutory Context, Including Section 251(f)

A. It Is Axiomatic That the Commission May Not Read Section 251(d)(2) In Isolation But Must Consider It In the Context of the Statutory Framework As a Whole

B. Congress Evinced a Clear Intention to Afford Market-Appropriate Treatment to Rural and Midsize Carriers

1. Section 251(f) Represents the Judgment of Congress That a One-Size-Fits-All Approach In Implementing Section 251 Is Inappropriate

2. Section 251(f) Demonstrates a Congressional Preference For a More Granular Analysis of Market Conditions, Consistent With the D.C. Circuit's Interpretation of 251(d)(2)

C. Section 251 Codified the Presumption That Unbundling Obligations Are Inappropriate In Markets Served By Rural Carriers, Where Congress Deemed Local Circumstances Sufficiently Different From Other Markets To Warrant Different Unbundling Rules

1. All rural carriers enjoy the exemption unless and until a requesting carrier proves that unbundling under Section 251(c) is "not unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act..."[10]

2. The Eighth Circuit found the FCC impermissibly lessened the protections that Section 251(f)(1) was meant to afford to rural carriers. The court therefore vacated §§51.405(a), (c) and (d) of the FCC's rules.[11]

3. In order to fully comply with the policy of market-specific regulation embodied in Section 251, the FCC should adopt appropriate burden-of-proof rules for markets served by rural carriers; this will guide the states in rural exemption termination cases and ensure the policies identified by the 8th

[10] 47 U.S.C. §251(f)(1).

[11] *Iowa Util. Bd. v. FCC*, 219 F.3d 744, 762 (8th Cir. 2000) ("*Iowa Utilities Board II*"). In cases to terminate the rural exemption, the court held: (a) that the FCC impermissibly placed the burden of proof on the ILEC seeking to retain the exemption, rather than on the CLEC seeking to have it terminated; (b) that the FCC impermissibly narrowed the "economically burdensome" prong of the required standard of proof to mean "without regard to the economic burden normally associated with competitive entry" where the statute makes no such limitation on that economic burden prong; and (c) that the FCC impermissibly dropped from the standard of proof the other two statutory prongs that CLECs were required to prove, technical feasibility and consistency with Section 254.

Circuit are implemented uniformly nationwide.[12]

D. Section 251 Also Granted "Broad Protections" Under Sections 251(b) and (c) to Two Percent Carriers[13]

1. The 8th Circuit vacated the FCC's first, narrow reading of § 251(f)(2) as contradicted by the plain meaning of the statute, and ordered that state commissions must consider "the full economic burden" on the two percent carrier of satisfying a request for UNEs.[14] As the Eighth Circuit noted, "There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in §251(b) or §251(c)." Congress gave special consideration to two percent carriers because they "have less of a financial capacity than larger and more urban ILECs" to comply with 251(b) and (c) requests.[15]

2. The Commission should instruct the states to consider whether unbundling obligations have a disproportionate impact on two percent carriers, considering their "full economic burden" as instructed by the 8th Circuit

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[12] *See* Petition for Reconsideration of Action in Rulemaking Proceeding, FCC Public Notice Rep. No. 2508 (rel. Oct. 19, 2001); 66 Fed. Reg. 54009 (Oct. 25, 2001).

[13] A state commission "*shall* grant" a two percent carrier's petition for suspension or modification of §251(b) or (c) requirements to the extent such suspension or modification "(A) is necessary – (i) to avoid a significant adverse economic impact on users of telecommunications services generally, (ii) to avoid imposing a requirement that is unduly economically burdensome, or (iii) to avoid imposing a requirement that is technically infeasible; and (B) is consistent with the public interest, convenience, and necessity." 47 U.S.C. §251(f)(2).

[14] *Iowa Utilities Board II*, 219 F.3d at 762 (in vacating §51.405(d) of the FCC's rules, the court noted, "It is the full economic burden on the ILEC of meeting the request that must be assessed by the state commission.... [T]he FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies.").

[15] *Id.*